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CEMP-C

Subject: Variation in Estimated Quantity Clause - FAR 52.211-18

Applicability: GUIDANCE

1. Purpose. Several recent inquiries have been addressed to CEMP-CP concerning the administration of the current FAR Clause 52.211-18 "Variation in Estimated Quantities" (VEQ). This Construction Bulletin (CB) clarifies HQUSACE's current guidance concerning the administration of equitable adjustments when actual quantities exceed the range established in the "VEQ" clause (above 115 or below 85 percent of the estimated quantity) in contracts that contain this clause.

2. Summary of Court Decisions:

a. The recent Court of Federal Claims' decision in Thermocor, Inc. v. United States, 35 Fed. Cl. 480 (1996) and the Federal Circuit's decision in Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993) (which followed Victory Constr. Co. v. United States, 510 F.2d 1379 (Ct. Cl. 1975)), concluded that there is no ambiguity in the VEQ clause and the plain meaning of the clause must control. An equitable adjustment under the VEQ clause requires proof, by the party making the demand, of an actual increase or decrease in costs due solely to the variation above 115 or below 85 percent of the estimated quantity. In the Thermocor case, the contractor underbid the contract unit price and the actual quantity exceeded 115 percent of the estimated quantity. The contractor requested an upward adjustment in the contract unit price for the quantity above 115 percent. The court held that in order to establish entitlement to the demanded adjustment, the contractor must prove that the cost of performing one unit of work of the overrun quantity is greater than the cost of performing one unit of work of the basic contract quantity. In an overrun situation, the fact that a contractor underbid the contract unit price does not by itself entitle the contractor to an increase in the contract unit price for the quantity above 115 percent. In Foley, an overrun case where the contractor overbid the contract price, the court held that the Government is not entitled to the demanded downward adjustment in the contract unit price because the government failed to prove that the contractor's actual

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unit cost for performing the overrun quantity was less than the unit cost for performing the basic contract quantity. Any demand for an equitable adjustment must be associated with an increase or decrease in costs and this increase or decrease in costs must be attributed to the variation above 115 or below 85 percent of the estimated quantity.

b. As a result of the Thermocor decision, which clarified the ambiguity that previously surrounded the interpretation of the FAR VEQ clause, HQUSACE decided to not pursue the development of a new EFARS VEQ clause. The Thermocor decision has also reaffirmed previous HQUSACE's guidance on establishing equitable adjustments pursuant to the FAR VEQ clause; that is the equitable adjustment should be based on Victory's interpretation and the subsequent Foley decision.

3. Implementation of Equitable Adjustments Under the VEQ Clause.

a. **Overrun.** When the actual quantity of a unit-priced item exceeds 115 percent of the estimated quantity, the actual quantity will be paid at the contract unit price. In addition, an adjustment in the contract price may be made upon demand of either party. The equitable adjustment shall be based on an *actual increase or decrease in costs due solely to the variation above 115 percent, i.e.,* the actual increase or decrease in costs should be attributed to the increase in the quantity (which is the difference between the actual quantity and 115 percent of the estimated quantity.) Equitable adjustments should not allow for complete repricing of unit priced items that exceeded the estimated quantity by more than 15 percent.

b. **Underrun.** When the actual quantity of a unit-priced item is below 85 percent of the estimated quantity, the actual quantity will be paid at the contract unit price and an adjustment in the contract price may be made upon demand of either party. The equitable adjustment shall be based on an *actual increase or decrease in costs due solely to the variation below 85 percent, i.e.,* the actual increase or decrease in costs should be attributed to the decrease in the quantity (which is the difference between 85 percent of the original estimated quantity and the actual quantity performed.)

c. **Time.** The FAR VEQ clause allows for a time extension, upon request by the contractor, when the actual quantity exceeds the estimated quantity and causes an increase in the time necessary for completion. Any overrun, even if it is less than 15 percent, may be grounds for a time extension. However, since the clause allows for an equitable adjustment only for overruns over 15 percent, time associated with the first 15 percent overrun is excusable, but not compensable. Time extensions associated with overruns greater than 15 percent may be compensable. When computing the equitable adjustment for time-related costs, contract administrators must be aware that the contract unit price (which is the basis for payment for overruns) would normally contain a share of the time-related costs. Accordingly, the compensation should not include those costs that have already been recovered.

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d. Impact. The FAR VEQ clause allows for an equitable adjustment *that is based on an actual increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.* Accordingly, if the performance of the additional quantity of work that is outside the 15 percent range impacts other activities and causes an actual increase or decrease in costs, the equitable adjustment may include such impact costs.

4. Recommended Contract Administration Actions.

a. When the contract documents include a VEQ clause, construction personnel performing BCOE reviews and other acquisition team members should: (1) be aware of the significance of developing, to the maximum extent possible, accurate estimates for the quantities of work to be performed pursuant to the VEQ clause, and (2) be alert during the procurement process to unbalanced bids (particularly when it involves unit price items). When the full scope of work cannot be reasonably defined, fixed price contracts with estimated quantities may not be appropriate and could lead to large and costly overruns. In these cases, alternative acquisition strategies should be examined such as cost reimbursement type contracts. The use of the EFARS clause 52.212-5001 "Variation in Estimated Quantities Subdivided Items" may also be beneficial in reducing the risks inherent in awarding a contract with estimated quantities (refer to CB No. 94-7 dated 3/25/94).

b. QA and contract administration personnel managing contracts with estimated quantities must be aware of the possibility of underruns or overruns which may require an adjustment in the contract price. Accordingly, they must keep fully informed as to the actual quantities performed by the contractor on unit priced items to avoid later disputes over payments. They must also be fully informed of the contractor's utilization of specific labor, material, and equipment that comprises the cost basis for unit-priced work and identify categories of costs that may be affected if actual quantities are greater or less than the limits provided in the contract. This should be useful in an overrun situation to spot changes in unit cost, avoid overpaying the contractor, and to assure that enough funds are available to cover the overrun quantity. On underruns, this should assist in analyzing the fixed or one-time costs and in estimating the equitable adjustment.

c. The party requesting the equitable adjustment under the VEQ clause has the burden of fully justifying the amounts requested with detailed cost data.

5. This CB was coordinated with the following HQUSACE organizations: Office of the Chief Counsel (CECC-C); Operations, Construction and Readiness Division (CECW-O); and The Principal Assistant Responsible for Contracting (CEPR-ZA).


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